BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below

The opinion of the New Jersey Court of Errors and Appeals (Tr. pp. 213-215) is reported in 127 N. J. L. 354 and 22 Atl. Rep. (2d) 286. The opinion of the New Jersey Supreme Court (Tr. pp. 203-209) is reported in 126 N. J. L. 25 and 16 Atl. Rep. (2d) 544.

II

Jurisdiction

The date of the judgment to be reviewed and the statutory provision which is believed to sustain the jurisdiction of this Court have been stated in the preceding petition, which is hereby adopted as a part of this brief.

III

Statement of the Case

The case has been partially stated in the preceding petition under I. We here expand the salient facts.

Petitioner, New York and Long Branch Railroad Company, operates and is the owner of a two-track railroad extending from a junction with the railroad of The Central Railroad Company of New Jersey at the north end of the bridge across Raritan Bay between Perth Amboy and South Amboy to a junction with The Pennsylvania Railroad Company at Bayhead, over which connecting line travel interstate passengers and freight (Tr. pp. 75-79 and

81, and Exhibits R-6, R-1 and R-4). Over said connecting line of petitioner interstate and intrastate trains of the Pennsylvania and of the Jersey Central, both passenger and freight, are operated under a tripartite agreement dated January 31, 1930 (Ex. R-6, Tr. pp. 128-177).* Petitioner has its own superintendent in charge of the operation and maintenance of petitioner's property, line, facilities and appurtenances (Article Four, Sec. 1 of Tripartite Agreement, Tr. p. 137). Petitioner also has its own ticket and freight agents who are appointed by its superintendent (Tr. p. 138). It sells through passenger tickets to points outside of New Jersey as well as to points within the State (Tr. p. 93). Most of the passenger trains operated over petitioner's line have their eastern or northern terminus either at the Pennsylvania Railroad station in New York City or at the Jersey City passenger terminal of the Jersey Central, where passengers transfer to or from ferries connecting with the Jersey Central's ferry terminus† at Liberty Street, New York City (Tr. pp. 61, 62, 92 and 93). Much of the freight passing over petitioner's aforesaid line of railroad originates at or is destined to points outside the State of New Jersey (Tr. pp. 92-93). In addition to the passenger and freight trains of the Pennsylvania and the Jersey Central, to which ref-

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* This agreement is in no sense a lease of petitioner's line to the Pennsylvania and the Jersey Central, as erroneously supposed by the Workmen's Compensation Bureau (Tr. p. 182), but a joint facility arrangement between the three roads. Petitioner reports separately to the Interstate Commerce Commission and its operations are not reported by either the Pennsylvania or the Jersey Central. The Bureau's misconception led it to the false conclusion that petitioner "is not a common carrier" (Tr. *id.*). However, the Court of Errors and Appeals did not share the Bureau's misconception or arrive at an erroneous conclusion in that respect.

† Until very recently, and at the time of the accident in question, the Jersey Central had a second ferry terminus at West 23rd Street, New York City.

erence has been made, petitioner owns and operates two drill engines which switch and move cars, both passenger and freight, which are engaged in interstate movements, including freight cars containing freight in interstate transit (Tr. pp. 93 and 94).

Petitioner's aforesaid line of railroad from the Raritan Bridge to Bayhead crosses a single track branch of the Jersey Central (extending from Freehold in a northeasterly direction to Keyport and East Long Branch) at a point known as the Matawan Tower. (See Ex. R-1, Tr. p. 118.) Petitioner's double track line is connected with said single track line of the Jersey Central, at the Matawan Tower intersection of said lines, by two connecting WYE tracks (*id.*).

The switches and signal equipment operated from the Matawan Tower control the operation of the aforesaid passenger and freight trains at the aforesaid crossing and connecting point. Fury, on January 29, 1935, the date of his injuries, was one of the employees of petitioner whose duties were to inspect, repair and maintain the signal apparatus and equipment in use at and around and operated from or connected with the Matawan Tower, and Fury's "domain of inspection embraced the Central Company's right of way from the intersection to and beyond the point of the mishap, for in that space were located signals and switches constituting a part of the interlocking signal plant essential to the switching of trains from one said road to the other at the Junction" (Tr. p. 207).

On and before January 29, 1935 Fury's regular hours were from 8 a. m. to 5 p. m. (Tr. p. 8). On the date mentioned he worked for about an hour of overtime repairing equipment in a substation which formed a part of the Matawan interlocking plant (Tr. pp. 10-83). At or shortly after 6 p. m., having completed the repair work, he started to walk home by the shortest available route which happened to be along the single track line of the

Jersey Central running in a northeasterly direction toward East Long Branch (Tr. p. 13). It was bitterly cold and there was about a foot of snow on the ground (Tr. p. 13). The only cleared path lay between the rails (Tr. p. 13). Fury followed this path, protecting his ears by ear-muffs or ear-tabs (Tr. p. 31). After he had walked a few hundred feet, but before arriving at the point at which he intended to leave the track to go to his nearby home, he was struck from behind and injured by the locomotive of a Jersey Central passenger train, of the approach of which he became aware too late to escape injury (Tr. pp. 18 and 102).

The two higher courts, as well as the Workmen's Compensation Bureau of New Jersey, concluded that Fury was not a trespasser and had not departed from the "ambit" or "domain" of his employment with petitioner when he was struck.

IV

ARGUMENT

POINT A

From the very nature of the employee's duties to inspect and maintain signal equipment used in connection with interstate commerce by rail the employee was engaged in interstate transportation or in work so closely related to it as to be practically a part of it.

We need do little more than to cite the controlling decisions of this Court:

Erie R. R. Co. v. *Winfield* (1917), 244 U. S. 170;
New York Central R. R. Co. v. *Winfield* (1917), 244 U. S. 147;
New York Central R. R. Co. v. *Porter* (1919), 249 U. S. 168;

Chesapeake & Ohio Ry. Co. v. *Stapleton* (1929), 279 U. S. 587;
New York Central R. R. Co. v. *Marcone* (1930), 281 U. S. 345.

In *New York Central R. R. Co.* v. *Winfield, supra,* the employee was a section laborer assisting in the repair of the carrier's main track and while tamping cross-ties struck a pebble which chanced to rebound and hit his eye. In *New York Central R. R. Co.* v. *Porter, supra,* the employee was a section-man who was struck and killed by the carrier's engine while engaged in shoveling snow along the track. It should be observed that the duties of the employee at bar required him to keep the switches "free of snow and ice" (Tr. p. 207). In *Chesapeake & Ohio Ry. Co.* v. *Stapleton, supra,* the employee was a section hand engaged at the time he was run over in bringing water for his companions. In *New York Central R. R. Co.* v. *Marcone, supra,* the employee's duty was to fill journal boxes of engines in a roundhouse for inspection. In *Erie R. R. Co.* v. *Winfield, supra,* the employee had been in charge of a switch engine in the carrier's freight yard at Croxton, N. J.

POINT B

It is entirely immaterial that the employee in the case at bar had started home and was not manually engaged upon his duties at the time of his injury.

This Court so ruled in *Erie R. R. Co.* v. *Winfield, supra,* wherein the employee had placed his switch engine for the night and had started to leave Croxton Yard. His route lay across some of the tracks and while passing over one he was struck by an engine and received injuries from which he soon died.

In *New York Central R. R. Co.* v. *Marcone, supra,* it was contended that the deceased employee, having finished his work, was no longer employed in interstate commerce. Mr. Justice STONE, now Chief Justice, adverted to the fact that there was some evidence to support a finding that the employee had not finished his work and added:

> "But if we assume that he had completed the work a few minutes before his death, he was still on duty. His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it and to entitle him to the benefit of the Employers' Liability Act." (Citing *Erie R. Co.* v. *Winfield, supra,* and other cases.)

See, also, *North Carolina R. R. Co.* v. *Zachary* (1914), 232 U. S. 248, in which it appeared that the employee, a locomotive fireman, at the time of the accident, was temporarily absent from his engine for a purpose not inconsistent with his duties and that the engine had not yet been coupled to the interstate cars which it was to move.

Clearly, then, the New Jersey Court of Errors and Appeals fell into error when it reasoned as follows:

> "Here the proofs are undisputed that, at the moment of injury, respondent was merely walking home from his work. The fact that the respondent was within the ambit of his services, and the fact that he might have become properly engaged in work forming a part of appellant's interstate transportation, do not meet the determinative prerequisite of the fixed test of exclusive jurisdiction within the meaning of the Federal Employers' Liability Act, *supra,* namely, that respondent was, at the moment of injury, *actually* engaged in work which in fact formed a part of the interstate transportation in which appellant was engaged."

POINT C

The Federal Employers' Liability Act is dominant and exclusive and supersedes the New Jersey Workmen's Compensation Act in all cases to which the former statute is applicable.

We need only refer to the cases already cited and to *Lindgren* v. *United States* (1930), 281 U. S. 38, in which the principle was applied to the Merchant Marine Act (which, in turn, incorporates the Federal Employers' Liability Act by reference). See also *New Orleans & Northeastern R. R. Co.* v. *Harris* (1918), 247 U. S. 367.

POINT D

The error of the court below resulted from its emphasis upon the employee's manual inactivity "at the moment of injury" instead of upon the nature of the duties usually performed by him and in which he had been engaged on the day of the accident.

The highest court below failed to cite in its opinion any of the cases cited above. Instead it cited *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.* (1916), 239 U. S. 556; *Illinois Central R. R. Co.* v. *Behrens* (1914), 233 U. S. 473, and *Erie R. Co.* v. *Welsh* (1916), 242 U. S. 303. In the first of these cases the employee "on the day of the injury" was engaged in taking down and putting into a new location an overhead counter-shaft,—a heavy shop fixture through which power was communicated to machinery in a repair shop. In the second case it was held that the requisite employment in interstate commerce did not exist where a member of a switching crew, at the time of his fatal injury, was engaged in an intrastate movement of several cars all loaded with intrastate freight. In the

third case, the employee was a yard conductor who was reporting to the yard master's office for further orders at the time of his injury, which orders might have involved either intrastate or interstate duties.

It is submitted that the cases cited below are inapposite, and that the later cases upon which we rely are controlling.

The court below fell into error in stating the "test" to be "whether the instrument of service at the moment of the injury and the work that the employee was doing at the moment of the injury, were actually a part of the interstate transportation in which the carrier was engaged." The reference in the opinion to "the instrument of service" is inapposite and confusing. The court seems to have had in mind such cases as *Industrial Accident Commission* v. *Davis* (1922), 259 U. S. 182, in which the employee was injured while engaged in repairing a locomotive which had been dismantled for heavy repairs. The test is not whether the "instrument of service" which causes the injury (such as an engine, a piece of machinery, or a tool) is engaged as an instrumentality of interstate commerce at the time of the injury, but whether the employing railroad and the employee injured are so engaged (cases cited including *Shanks* v. *Delaware, Lackawanna & Western R. R. Co., supra; cf. Boston & Maine R. Co.* v. *Armburg* (1932), 285 U. S. 234).

Apparently referring to the rule applied in *Industrial Accident Commission* v. *Davis, supra,* but without citing that case, the court below concluded that:

> "What is true as to the mechanical instrumentality (when withdrawn from interstate transportation) is, in all reason and justice, true as to the human instrumentality, the employee."

The fallacy of the analogy lies in the fact that this Court has held that an employee does not withdraw from inter-

state commerce in which he has been engaged merely because he has finished his day's work and is in the course of departure from the scene thereof. *Erie R. R. Co.* v. *Winfield, supra,* and other cases cited under Point B hereof.

POINT E

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision and judgment of the court below.

Respectfully submitted,

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